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BEFORE THE  
FEDERAL MARITIME COMMISSION Federal Maritime Commission  
Office of the Secretary

Docket No. 14-06

SANTA FE DISCOUNT CRUISE PARKING, INC. d/b/a EZ  
CRUISE PARKING; LIGHTHOUSE PARKING, INC.; and  
SYLVIA ROBLEDO d/b/a 81<sup>st</sup> DOLPHIN PARKING

Complainants

v.

THE BOARD OF TRUSTEES OF THE GALVESTON  
WHARVES and THE GALVESTON PORT FACILITIES  
CORPORATION

Respondents

RESPONSE TO OPPOSED MOTION TO STRIKE COMPLAINANTS'  
RESPONSE TO MOTION TO DISMISS BY THE BOARD OF  
TRUSTEES OF THE GALVESTON WHARVES AND  
THE GALVESTON PORT FACILITIES CORPORATION

Complainants Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking, Lighthouse Parking, Inc., and Sylvia Robledo d/b/a 81<sup>st</sup> Dolphin Parking (collectively "Complainants") file their Response to Opposed Motion to Strike Complainants' Response to Motion to Dismiss by The Board of Trustees of the Galveston Wharves ("Wharves") and the Galveston Port Facilities Corporation ("GPFC") (Wharves and GPFC sometimes collectively referenced as "Respondents") and, in support thereof, would show as follows:

## I.

### INTRODUCTION

In May 2014, Respondents approved increases in access fees charged under the Wharves' Tariff Circular No. 6, Item 111 ("2014 Tariff") to become effective July 1, 2014, and Complainants initiated the instant action on June 16, 2014 against Respondents challenging same. Respondents timely answered, denying the 2014 Tariff violated any provisions of the Shipping Act of 1984. After over three months of litigating this dispute, on September 22, 2014, the Wharves Board met and approved yet another modification to the 2014 Tariff, which abolished the "Off-Port Parking User Access Fees" definition formerly being charged to Complainants. Under the September 22, 2014 amendment, Complainants would now incur Per Trip Access Fees pursuant to the rates previously published in the 2014 Tariff.

On October 21, 2014, Respondents filed their Motion to Dismiss, alleging Complainants' claims arising under the Shipping Act of 1984 should be dismissed as moot in light of Respondents' September 22, 2014 amendment to and deletion of the "Off-Port Parking Users" definition contained in the 2014 Tariff. Respondents served their Motion to Dismiss on counsel for Complainants via U.S. certified mail, return receipt requested on October 21, 2014, and contemporaneously therewith provided a courtesy copy of same via e-mail.<sup>1</sup> On November 10, 2014, Complainants filed their Response to Respondents' Motion to Dismiss and served same on counsel for Respondents. Subsequently, on November 13, 2014, Respondents filed their Opposed Motion to Strike Complainants' Response to Motion to Dismiss ("Motion"), arguing Complainants' Response was untimely filed.

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<sup>1</sup> On October 24, 2014, Complainants filed their Opposed Motion for Leave to File First Amended Complaint, which is currently pending.

## II.

### ARGUMENT AND AUTHORITY

In their Motion, Respondents contend Complainants' Response was untimely filed and that same should be stricken pursuant to Federal Rule of Civil Procedure 12(f).<sup>2</sup> (Respondents' Mot., at pp. 1-2). Respondents' argument that Complainants' Response is untimely is solely premised on the October 21, 2014 courtesy copy of the Motion sent to counsel for Complainants via e-mail, which, by Respondents' count, would make Complainants' deadline to file a response due on or before Wednesday, November 5, 2014. *Id.* at pg. 2.

In support of their argument, Respondents cite the Federal Maritime Commission's Rule of Practice and Procedure 46 C.F.R. 502.70(b), which provides that "A response to a dispositive motion must be served within 15 days after the date of service of the motion...." *Id.* To arrive at the November 5, 2014 deadline for Complainants to file their Response, Respondents erroneously computed the time from the day the courtesy copy of their Motion was sent to counsel for Complainants via e-mail. Respondents' Motion, however, was served on October 21, 2014, via U.S. certified mail, return receipt requested to Complainants' counsel. (Respondents' Mot. Dismiss, at pg. 11). Regardless, under either method of service, Complainants' Response was timely filed pursuant to Rules 5 and 6 of the Federal Rules of Civil Procedure and the Federal Maritime Commission's Rule of Practice and Procedure.

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<sup>2</sup> Rulings on motions to strike under Rule 12(f) rest in the sound discretion of the court and are viewed as a drastic remedy and generally disfavored. *See Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1057 (5<sup>th</sup> Cir. 1982); *see also Ruby v. Davis Foods, Inc.*, 269 F.3d 818, 820 (7<sup>th</sup> Cir. 2001) (stating that courts should exercise their discretion and strike pleadings when same are both "redundant, immaterial, impertinent, or scandalous" and prejudicial to the opposing party); *Tonka Corp. v. Rose Art Indus., Inc.*, 836 F. Supp. 200, 217 (D. N.J. 1993) (stating that a court has "considerable discretion in disposing a motion to strike under Rule 12(f)"). Additionally, some courts have recognized that legal briefs are argumentative and sometimes contentious filings and that a brief, as opposed to other forms of pleadings, typically do not constitute a "pleading" under Rule 12(f) and subject to a motion to strike. *See Hrubec v. National R.R. Passenger Corp.*, 829 F. Supp. 1502, 1506 (N.D. Ill. 1993).

**(A.) Complainants timely filed their response to Respondents' Motion to Dismiss.**

The Federal Maritime Commission ("FMC") Rules of Practice and Procedure expressly set forth the manner and method of service of pleadings and computation of time. Specifically, the Rules provide, in part, as follows:

**502.101 Computation.**

In computing any period of time under the rules in this part, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or national legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or national legal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, or national legal holidays shall be excluded from the computation.

**502.114 Service by parties of pleadings and other documents.**

(a) Except as otherwise specifically provided by the rules in this part, all pleadings, documents, and papers of every kind (except requests for subpoenas, documents served by the Commission under § 502.113, and documents submitted at a hearing or prehearing conference) in proceedings before the Commission under the rules in this part shall, when tendered to the Commission or the presiding officer for filing, show that service has been made upon all parties to the proceeding and upon any other persons required by the rules in this part to be served. Such service shall be made by delivering one copy to each party; by hand delivering in person; by mail, properly addressed with postage prepaid; by courier; or by facsimile transmission if agreed by both parties prior to service.

**502.116 Date of service.**

The date of service of documents served by the Commission shall be the date shown in the service stamp thereon. The date of service of documents served by parties shall be the date when matter served is deposited in the United States mail, delivered to a courier, delivered in person, or transmitted by facsimile, as the case may be. In computing the time from such dates, the provisions of § 502.101 shall apply.

#### 502.12 Applicability of Federal Rules of Civil Procedure.

In proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice.

*See* 46 C.F.R. 502.101, 502.114, 502.116, 502.12.

It is well-established that service of pleadings by U.S. mail or electronic transmission extends a party's filing deadline by three (3) days. *See* FED. R. CIV. P. 5(b)(2)(C), (E); FED. R. CIV. P. 6(d). At no time during the pendency of this action have the parties or counsel agreed in writing that service of pleadings and computation of time is based upon the date of receipt of such pleadings via e-mail. Accordingly, the computation of time to file a responsive pleading to a dispositive motion is based on applicable FMC Rules of Practice and Procedure and Federal Rules of Civil Procedure governing service of pleadings.

In the instant case, Respondents' Motion to Dismiss was served on counsel for Complainants on October 21, 2014 via certified mail, return receipt requested. Complainants concede that pursuant to applicable FMC Rules, they had fifteen (15) days to file their response to Respondents' Motion. *See* 46 C.F.R. 502.74(a)(2). In computing the response deadline, Complainants followed the applicable rules pertaining to service of pleadings via U.S. mail and electronic transmission, which extends the deadline by three days. Extending the 15-day deadline by three days resulted in the deadline for Complainants' Response to be filed on Saturday, November 8, 2014. Pursuant to 46 C.F.R. 502.101, when the last day of the period falls on a Saturday, Sunday, or national legal holiday, the period "runs until the end of the next day which is not a Saturday, Sunday, or national legal holiday." Thus, Complainants' Response

to Respondents' Motion was due on Monday, November 10, 2014, in which same was timely filed and served by Complainants.<sup>3</sup>

**(B.) In the alternative, Respondents have failed to satisfy their burden under Rule 12(f) or demonstrate they were prejudiced in the event Complainants' Response was untimely filed.**

Alternatively, and in the event the Court finds Complainants' response was untimely filed, Respondents have not argued or demonstrated how they would be prejudiced by the late filing. If a court has not considered a motion and a response is subsequently filed after the deadline, a court can still consider the response at its discretion. *See Callip v. Harris County Child Welfare Dept.*, 757 F.2d 1513, 1516-157 (5<sup>th</sup> Cir. 1985); *see also Brandon v. Rite Aid Corp., Inc.*, 408 F. Supp. 2d 964, 967 (E.D. Cal. 2006)(denying a motion to strike an untimely filing because there was "no danger of delay or prejudice"); *Guilbeaux v. 3927 Foundation, Inc.*, 177 F.R.D. 387, 390 (E.D. Tex. 1998)(denying a party's motion to strike a response as untimely when the party has not alleged or proven that it would suffer prejudice if the court entertained the late-filed response). Given the absence of any prejudice, Respondents have failed to carry their burden. *See Act Now to Stop War and End Racism Coal. v. District of Columbia*, 286 F.R.D. 117, 125 (D.D.C. 2012)(recognizing that a proponent of a motion to strike "must carry a 'formidable burden.'")(quoting *Judicial Watch v. Dep't of Commerce*, 224 F.R.D. 261, 264 (D.D.C. 2004)).

### III.

#### CONCLUSION

Based on the foregoing, Complainants complied with applicable FMC and Federal Rules of Civil Procedure governing service of pleadings and timely filed their Response to Respondents' Motion to Dismiss. In the alternative, in the event Complainants' Response was

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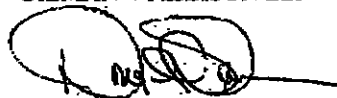
<sup>3</sup> Respondents admit that Complainants' Response was filed on November 10, 2014. (Respondents' Mot., at pg. 2).

untimely, Respondents have failed to carry their burden under Rule 12(f) or prove how they were prejudiced by the late filing. Therefore, Respondents' Motion to Strike should, in all things, be DENIED.

WHEREFORE, PREMISES CONSIDERED, Complainants Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking, Lighthouse Parking, Inc., and Sylvia Robledo d/b/a 81<sup>st</sup> Dolphin Parking respectfully request the Court deny Respondents' Opposed Motion to Strike Complainants' Response to Motion to Dismiss by the Board of Trustees of the Galveston Wharves and the Galveston Port Facilities Corporation.

Respectfully submitted,

GILMAN \*ALLISON LLP



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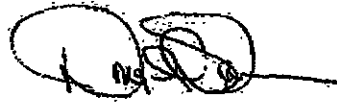
**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed this document on this **14th day of November, 2014**, and that a true and correct copy of the foregoing was served on all counsel of record *via* certified mail – return receipt requested and email, as indicated below:

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**ATTORNEYS FOR THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES  
AND GALVESTON PORT FACILITIES CORPORATION**

A handwritten signature in black ink, appearing to read "D. Gilman", is written over a horizontal line.

Douglas T. Gilman